FILED
JAN 22 1992
OFFICE OF THE CLERK

No. 91-1006

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

U. S. MARINE CORPORATION AND
BAYLINER MARINE CORPORATION,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD AND
INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS
OF AMERICA, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, AND ITS AFFILIATED LOCAL LOCAL 879, ALLIED INDUSTRIAL WORKERS OF AMERICA'S BRIEF IN OPPOSITION

KENNETH R. LOEBEL
Counsel of Record
PREVIANT, GOLDBERG, UELMEN,
GRATZ, MILLER & BRUEGGEMAN, S.C.
1155 N. RiverCenter Dr.
Suite 202
P. O. Box 12993
Milwaukee, WI 53212
(414) 271-4500
Attorneys for Respondents International Union, Allied Industrial Workers of America, AFL-CIO and its affiliated local, Local 879, Allied Industrial Workers of America

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

LIST OF PARTIES

In addition to the International Union, Allied Industrial Workers of America, AFL-CIO, which is listed in the caption, Local 879, Allied Industrial Workers of America, which is an affiliated local of the International Union, Allied Industrial Workers of America, AFL-CIO, was also a party to those proceedings had before the Court of Appeals.

The International Union, Allied Industrial Workers of America, AFL-CIO and its affiliated local, Local 879, Allied Industrial Workers of America, will hereinafter be referred to together as the "Union".

TABLE OF CONTENTS

	Page
LIST OF PARTIES	i
TABLE OF AUTHORITIES	iv
COUNTER STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	12
I. AN EMPLOYER'S REFUSAL TO HIRE THE EMPLOYEES EMPLOYED BY THE PREDECESSOR AS PART OF A SCHEME TO EVADE ACQUIRING A BARGAINING OBLIGATION UNDER *BURNS* IS UNLAWFUL UNDER § 8(a)(3) OF THE ACT AND THE COURT OF APPEALS DECISION HOLDING THAT THERE WAS SUBSTANTIAL EVIDENCE ON THE RECORD TO SUPPORT THE BOARD'S CONCLUSION WAS PROPER	13
II. THE BOARD'S RESTORATION OF THE STATUS QUO ANTE REMEDY WAS NOT INCONSISTENT WITH *"BURNS"*; WAS NOT PUNITIVE; AND THE COURT OF APPEALS' DECISION ENFORCING THE BOARD'S REMEDIAL ORDER APPLIED THE PROPER STANDARD FOR REVIEW AND WAS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS	15
CONCLUSION	22

TABLE OF AUTHORITIES

Cases	Page
Ballou Birch Co. v. NLRB, 798 F.2d 339 (8th Cir. 1986)	15
Bigelow v. RKO Radio Pictures, 327 U. S. 251 (1946)	20
Birch Run Welding and Fabricating Inc. v. NLRB, 761 F.2d 1175 (8th Cir. 1985)	15
Fall River Dying & Finishing Corp. v. NLRB, 482 U.S. 27 (1987)	16, 18
Fibreboard Corp. v. NLRB, 379 U.S. 203 (1964)	17
Food Handlers v. Valmac, 528 F.2d 217 (8th Cir. 1975)	21
Franks Bros Co. v. NLRB, 482 U.S. 27 (1987)	16
Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973)	14
Halo-Krome Co. v. NLRB, —— F.2d ——, 138 LRRM 2661 (1991)	14
Howard Johnson Co. v. Hotel Employees, 417 U.S. 249 (1974)	13, 17
Laborers Trust Fund v. Advanced Concrete, 484 U.S. 539 (1988)	13, 17
Local 879 AIW, et al. v. Chrysler Marine Corp., et al., Civil Action 83-C-1983	3
Local 879, AIW v. Chrysler, 819 F.2d 786 (7th Cir. 1987)	3
M.S.F. Industries Inc. v. NLRB, 568 F.2d 166 (10th Cir. 1977)	15
Majestic Molded Products Inc. v. NLRB, 330 F.2d 603 (2nd Cir. 1964)	15
NLRB v. Burns Int'l Security Services, 406 U.S. 272 (1972)	13, 16, 17
NLRB v. C & C Plywood, 385 U.S. 421 (1967)	16
NLRB v. Katz, 36 U.S. 736 (1962)	19
NLRB v. Transportation Management Corp., 462 U.S. 393 (1983)	14
H. K. Porter Co. v. NLRB, 397 U.S. 99 (1970)	18
Riggs v. Palmer, 115 N.Y. 506, 511-512, 22 N.E. 188 (1989)	20
Simon & Schuster, Inc. v. Members of New York State Crime Victims Board, —— U.S. ——, 60 U.S. L.W. 4029 (1991)	20

TABLE OF AUTHORITIES—Continued

	Page
Spruce Up Corp., 209 NLRB 194 (1974), *enfc'd*, 529 F.2d 516 (4th Cir. 1975)	18
Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555 (1931)	20
Thorp Sales Corp. v. Gyuro Grading Co., 111 Wis.2d 432 (1983)	20
Virginia Electric & P. Co. v. NLRB, 319 U.S. 533	18
Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)	14

Other Authorities

Section 8(a) (3) (5) and (1)	*passim*
Section 10(j)	*passim*
Paradigms Lost, John L. Casti	20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1006

U. S. MARINE CORPORATION AND
BAYLINER MARINE CORPORATION,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD AND
INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS
OF AMERICA, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENT INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, AND ITS AFFILIATED LOCAL LOCAL 879, ALLIED INDUSTRIAL WORKERS OF AMERICA'S BRIEF IN OPPOSITION

The Respondent Union respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of U. S. Marine Corporation and Bayliner Marine Corporation (hereinafter referred to together as "U. S. Marine")[1] to review the judgment of the Seventh Circuit

---

[1] U. S. Marine in its Rule 29.1 Statement has pointed out that at the present time Brunswick Corporation ("Brunswick") has acquired all the shares of U. S. Marine and Bayliner Marine. It should be noted that it was in the latter part of 1986 that Brunswick had acquired all the shares of Bayliner and U. S. Marine from the prior four common shareholders (App. 100a) and has exercised

reported at 944 F.2d 1305 (7th Cir. Sept. 25, 1991) (en banc).

COUNTER STATEMENT OF THE CASE

The petition of U. S. Marine tends to overlook or omit record evidence; how the National Labor Relations Board (Board) had analyzed that evidence; and the standard that was applied by the Court of Appeals in reviewing the Board's findings and conclusions relative to that record evidence.

What the record discloses is that on October 19, 1983, Orin Edson,[2] the then Chairman of Bayliner, had written Chrysler and asserted, ". . . Our entire goal is to purchase *an ongoing business* . . . Bayliner Marine Corporation or its assignee, would agree to purchase all the assets of the Chrysler Marine Corporation . . ." (GC 103).[3] (emphasis added)

On December 7, 1983, James W. Hoag, Bayliner's Vice-President for Administration and an attorney, reported to Hartford, Wisconsin and on behalf of U. S. Marine was responsible for the hiring of the employees to be employed at the Hartford plant after the sales/purchase agreement with Chrysler was consummated (ALJ at App., 101a-102a).

On December 13, 1983 Hoag along with Chrysler representatives, met with the Union's representatives and

---

control over the plant located in Hartford, Wisconsin. In April 1991 it was announced by Brunswick that the decision to close the Hartford, Wisconsin plant had been made and it is undisputed that by no later than January 31, 1992 such plant will be totally closed and the few employees left will also be let go.

[2] Orin Edson was one of the only four shareholders who owned both Bayliner and U. S. Marine (App. 100a).

[3] The Union will refer to references from U. S. Marine's Petition as ("Employer's Pet. p. ——"); to the decision of the Administrative Law Judge as ("ALJ at App. ——"); to the decision of the Board as ("Board at App. ——"); to General Counsel's exhibits as "GC ——"); and to employer exhibits as (Emp. Exh. ——").

Hoag informed the Union's representatives that Bayliner did not intend to recognize the Union and that he was not interested in having a union represent the employees, and that he was too busy to deal with the Union at that time (ALJ at App. 114a).

On December 28, 1983, Hoag provided Chrysler with his sworn affidavit that Chrysler then presented to the U. S. District Court for the Eastern District of Wisconsin in the matter of *Local 879 AIW, et al. v. Chrysler Marine Corp., et al.*, Civil Action 83-C-1983 and wherein Hoag swore ". . . That Bayliner . . . (d/b/a U. S. Marine) . . . expects to have a representative complement of employees hired in early January of 1984 . . . He [Hoag] further believes that their [Chrysler employees] prior work experience will be advantageous in securing employment with Bayliner as it should reflect the qualification it seeks . . ." (GC Exh. 12).[4]

On January 13, 1984 Chrysler closed its doors (ALJ at App. 100a). At the time Chrysler closed the Hartford plant it had employed approximately 262 employees in the bargaining unit represented by the Union (ALJ at App. 110a).

Hoag established the procedures that were to be followed for the interviewing of those applicants who sought to be employed by U. S. Marine at the Hartford plant and it was Hoag that made the decisions as to who would be hired and who would not be hired (ALJ at App. 112a).

On January 23, 1984 U. S. Marine commenced production at the Hartford plant with 219 employees, all of

---

[4] The Union had obtained a "Boy's Market" preliminary injunction pending the results of arbitration against Chrysler, but Chrysler obtained a stay within days from the Court of Appeals (App. 5a). *Also see Local 879, AIW v. Chrysler*, 819 F.2d 786, 787 (7th Cir. 1987). It wasn't until after the Court of Appeals decision in *Chrysler* in May 1987, over three years after U. S. Marine took over, that the former Chrysler employees received the fruits from the Union's success in the arbitration against Chrysler.

whom had been former Chrysler employes. (ALJ at App. 112a-113a).

On January 25, 1984 the Union requested U. S. Marine to recognize it and to provide the Union with certain information. When the Union received no response, it filed the ULP charges in 30-CA-8206 on February 2, 1984. (ALJ at App. 114a-115a).

U. S. Marine continued to hire employees after the Union filed the ULP charge but no further former Chrysler employees were hired (ALJ at App. 113a). There were 34 former Chrysler employees who had applied for employment, all of whom had between 10 years and 31 years of service with Chrysler (Board at App. 68a n.4) and who possessed the skills, abilities, and versatility and other work related characteristics comparable to those 223 former Chrysler employees who had been hired. None of the 34 former Chrysler employes not hired was ever given any reason by Hoag or anyone else as to why he or she had been rejected (ALJ at App. 127a and *see* Tr. 1298-1300).

On February 8, 1984, U. S. Marine wrote to Region 30 of the NLRB in response to the Union's ULP charge in Case No. 30-CA-8206 and then claimed, ". . . that the time to review the employment status to determine successorship is when a representative complement has been hired and not before . . ." (GC Exh. 66).[5]

On February 17, 1984 U. S. Marine again wrote to Region 30 of the NLRB and asserted, ". . . Based on production forecasts prepared in January, Employer expects that 460 production and maintenance workers will be employed in June 1984. This forecast was prepared on the basis of information from Employer's marketing and manufacturing departments . . .

---

[5] In Hoag's earlier sworn affidavit provided to the district court in the *Chrysler* case Hoag had represented under oath "That Bayliner . . . (d/b/a U. S. Marine) . . . expects to have a representative complement of employees hired in early January of 1984 . . ." (GC Exh. 12).

"There are approximately 35 open applications from former Chrysler employees. It is very unlikely when the complement of 460 is reached a majority will have been former Chrysler employees . . . If the work force at the appropriate time *consists of a majority of former Chrysler employees*, then the question of successorship for recognition must be addressed . . ." (GC Exh. 43) (emphasis added).

On February 28, 1984, the General Counsel of the NLRB caused to be issued a complaint in 30-CA-8206 alleging that U. S. Marine was violating § 8(a)(5) and (1) by failing to recognize the Union. On March 2, 1984, U. S. Marine filed an answer denying that it had any obligation to recognize the Union and to begin to bargain collectively with the Union as the exclusive bargaining representative of the employees.

On April 13, 1984, the Board petitioned the U. S. District Court for the Eastern District of Wisconsin for interim relief as provided for under § 10(j) of the Act while the proceedings were pending before the administrative agency. Hoag in another affidavit dated April 27, 1984 (GC Exh. 43) and submitted to the district court in opposition to the Board's seeking interim relief under § 10(j), represented therein that U. S. Marine's employment projections evidenced that there would be 460 employees employed in June 1984.

Hoag did not disclose to the Board or to the District Court that U. S. Marine then had two employment projections in its possession prepared on February 15, 1984 and April 4, 1984 evidencing that the number of employees employed in June 1984 would not exceed 396 (GC Exh. 35 and 38; *also see* App. 9a n.6).

The employment projection prepared by Hoag sometime in January 1984 to show 460 was later found by the ALJ to have been, ". . . false and designed to deceive the Board and the Courts . . ." (ALJ at App. 133a) The Board affirmed such finding (Board at App. 64a-65a).

On May 10, 1984 the district court granted the Board's petition under § 10(j) and caused to be issued an injunction enjoining U. S. Marine from refusing to recognize the Union during the pendency of the administrative proceedings that were still to be had before the NLRB.

U. S. Marine did not take any appeal from the District Court's 10(j) injunction and pursuant to that injunction U. S. Marine began to meet with the Union.[6]

In response to the Union's request to know what reasons existed as to why U. S. Marine had not hired any of the 34 former Chrysler employees while continuing to hire other individuals Hoag informed the Union "that the hiring was done by Bayliner managers and staff who were totally unfamiliar with the history and personnel conflicts of the former Chrysler organization." (Emp. Exh. 24).[7]

Between January 23, 1984 and July 2, 1984, which is the date the Union filed the unfair labor practice charge alleging the 34 8(a)(3)'s, U. S. Marine had hired approximately 102 additional employees none of whom had been formerly employed by Chrysler (GC Exh. 41g).

On October 1, 1984 the Union filed an additional unfair labor practice charge wherein it alleged that U. S. Marine

---

[6] James Hoag was U. S. Marine's principal representative in the bargaining meetings that were had as a result of the issuance of the § 10(j) injunction by the District Court. U. S. Marine did not withdraw its answer to the General Counsel's outstanding complaint and it continued to deny that it was a successor to Chrysler.

In addition, U. S. Marine continued to hold Safety and Progress Committee meetings whereby it continued to deal directly with the employees and for which it was found in contempt (App. 10a).

[7] Subsequently at the hearings had before the ALJ, Mr. Hoag testified that in fact he had met with three former Chrysler executives and had each of these three individuals rate all the former Chrysler employees on a scale of one to three. The ALJ found that "Hoag then considered all this information and made the decisions on those who would be hired, and those who would not, without further consultation with the interviewers, the former Chrysler officials, or anyone else . . ." (ALJ at App. 112a)

did not confer in good faith in an effort to reach any agreement.

The NLRB's General Counsel caused complaints to be issued relative to each of the two additional unfair labor practice charges the Union had filed in addition to the complaint issued in the original charge. On September 16, 1985, the hearings before the ALJ were opened involving all three complaints that had been issued and these hearings consumed some nine (9) days and 1,887 pages of transcript as well as over 150 total exhibits.

Notwithstanding that U. S. Marine's principal representative Mr. Hoag, an attorney, had earlier provided a sworn affidavit to the District Court wherein he had identified that it was ". . . Bayliner . . . (d/b/a U. S. Marine) [that] expects to have a representative complement of employees hired . . ." (GC 12), U. S. Marine nonetheless denied the allegation that Bayliner and U. S. Marine constituted a single employer. U. S. Marine also persisted in its denial that it had violated the Act by having failed to recognize the Union when the Union had first requested it to do so in January 1984 even though by September 16, 1985, U. S. Marine knew that the number of employees employed by it at the Hartford plant had never reached the 460 figure in June of 1984 that Hoag had falsely projected and that in fact the number of former Chrysler employees employed by it had always constituted a majority of U. S. Marine's work force (Board at App. 64a-65a).[8]

On August 22, 1986 the ALJ issued his decision and found, amongst other things, ". . . that the manpower figures computed by Hoag were false and designed to deceive the Board and the Courts on a theory that full em-

[8] U. S. Marine also even denied that the bargaining unit was appropriate and the ALJ later held, ". . . I find in these instances that Respondents' Answers are not based upon real issues of fact or law, are frivolous and are designed to prolong and extend these proceedings . . ." (ALJ at App. 125a n.26).

ployment at the 460 level would not be attained until June . . ." (ALJ at App. 133a); and that U. S. Marine had violated § 8(a)(5) and (1) in numerous respects (ALJ at App. 148a-151a).

The ALJ did not, however, conclude that U. S. Marine's failure to have hired the 34 former Chrysler employees violated § 8(a)(3) or (1) of the Act. (ALJ at App. 133a)

U. S. Marine filed exceptions to the ALJ's decision and in those exceptions it persisted in claiming that U. S. Marine and Bayliner were not a single employer, and it also excepted "to any remedy in light of the fact that no unfair labor practices were committed . . ."

Both the Union and General Counsel had taken exceptions to the ALJ's decision and each had also filed answering briefs to the exceptions taken by U. S. Marine, U. S. Marine, however, filed no answering brief to the exceptions taken by either the Union or General Counsel even though both the Union and General Counsel were seeking additional relief including a restoration of the status quo ante remedy (Board at App. 61a).

On April 17, 1989, the Board issued its decision and order and affirmed the ALJ's findings that the manpower figures concocted by Hoag had been false and designed to deceive the Board and the courts (Board at App. 64a-65a), and that U. S. Marine and Bayliner constituted a single employer (Board at App. 62a) and that U. S. Marine had violated § 8(a)(5) and (1) of the Act in the various ways as determined by the ALJ (Board at App. 62a).

In addition, however, the Board, contrary to the ALJ, concluded that U. S. Marine's failure to have hired the 34 former Chrysler employees did violate § 8(a)(3) and (1) of the Act because as the Board explained, ". . Once Hoag decided that 460 would be the false projection, it became imperative that he hire fewer than 231 former

Chrysler employees, or the 460 figure became meaningless as a defense to the Union's recognition claim. Thus, the sham inflation of the full-compliment projection and the decision to stop rehiring former Chrysler employees once their number had reached 223 are complementary aspects of *the same scheme sought to be carried out by* U. S. Marine . . ." (App. 66a; Board at App. 66a; emphasis added).

The Board's order required U. S. Marine, amongst other things, to offer employment to and make whole those 34 former Chrysler employees that had applied for employment, but had not been hired nor provided any reason by U. S. Marine as to why any of them had not been hired. (Board at App. 78a-79a)

In addition, the Board's order[9] required that U. S. Marine,

> 2. Take the following affirmative action necessary to effectuate the policies of the Act . . . (c) On request of the Union, rescind any departures from terms and conditions of employment that existed immediately before the Respondent's take over from Chrysler Corporation of the Hartford, Wisconsin operations, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, and make the employees whole by remitting all wages and benefits that would have been paid absent such unilateral changes from January 23, 1984 until they regotiate in good faith with the Union to agreement or to impasse . . .

(Board at App. 77a).

U. S. Marine then petitioned the Seventh Circuit to review the Board's order only insofar as the Board's order

---

[9] One member dissented to the restoration of the *status quo ante* remedy sua sponte on due process grounds namely that such remedy had not been alleged in the complaint (Board App. 80a-85a). U. S. Marine makes no claim that the Court of Appeals rejection of that due process argument was improper (*see* App. 39a-42a).

had held that U. S. Marine had violated § 8(a)(3) and (1) by failing to hire the 34 former Chrysler employees and insofar as the Board's remedial order required U. S. Marine to restore the status quo ante that had existed immediately prior to U. S. Marine's take over.[10]

U. S. Marine no longer challenged the ALJ's conclusions, as affirmed by the Board, that:

(1) U. S. Marine Crporation and Bayliner constituted a single employer,

(2) U. S. Marine was a successor employer to Chrysler,

(3) U. S. Marine violated section 8(a)(5) and (1) of the Act by

(a) refusing to recognize and furnish certain information to the Union,

(b) failing to bargain in good faith with the Union,

(c) unilaterally implementing changes in terms and conditions of employment,[11]

(d) bargaining individually with employees, and

(e) establishing and bargaining with an employer-dominated labor organization (the Safety and Progress Committee).

(App. 17a-18a).

Judge Ripple writing for the majority of the Seventh Circuit did observe, however, that in analyzing the Board's

---

[10] The Union also petitioned the Seventh Circuit to review the Board's order insofar as the Board had failed to provide additional remedies requested by the Union. The Seventh Circuit denied the Union's petition (App. 43a-51a).

[11] The Unilateral changes referred to were those that U. S. Marine put into effect after it met with the Union but reached no bona fide impasse (ALJ App. 148a-150a).

order that "We also note that these uncontested violations 'do not disappear by not being mentioned in a brief. They remain, lending their aroma to the context in which the [remaining] issues are considered citation omitted] . . ." (App. 18a)

On September 25, 1991, the en banc Court of Appeals issued its decision enforcing in full the Board's order. The decision was unanimous that there was substantial evidence on the record as a whole to support the Board's conclusion that U. S. Marine's failure to have hired the 34 former Chrysler employees violated § 8(a)(3) and (1) of the Act (App. 28a-29a; 51a-52a).

As to the Board's remedial order that required U. S. Marine to restore the status quo ante (App. 77a) the vote was 6-5 to enforce the Board's order. The majority opinion by Judge Ripple held the Board's remedy in the circumstances of this particular case was within the Board's statutory authority under $10(c) because

> . . . The Board's order is designed to prevent U. S. Marine from taking advantage of its wrongdoing to the detriment of the employees. The Board presumes that, but for the unlawful practice, substantially all of the employees would have been retained and the employer would be obliged to consult with the Union before setting new terms. Because of this obligation to bargain with the Union, restoration of the previously existing employment terms, the *status quo ante*, is an appropriate remedy . . .

(App. 38a)

The dissenting opinion by Judge Easterbrook, was grounded on the premise that even a new owner that seeks by unlawful means, including unlawfully refusing to hire employees of the predecessor for no reason other than to evade acquiring the obligations of a "successor" under the Act nonetheless still retains the absolute right to establish whatever initial terms and conditions of employment that it chooses and the Board's order was not a remedy but was a penalty and should not be enforced. (App. 51a-52a)

REASONS FOR DENYING THE WRIT

U. S. Marine's petition for certiorari claims that the Seventh Circuit's judgment gives rise to two questions – that are both worthy of review by this Court.

The Union suggests that in regards to the alleged issue of "Whether the Board and the Court of Appeals misallocated the statutory burden of proof by ordering U. S. Marine to hire the remaining 34 former Chrysler workers . . ." (U. S. Marine Petition at i) that such "issue", regardless of how artfully phrased, does not justify this Court's review of what at its core, simply involves a question of weighing the evidence in the record to determine whether or not there was substantial evidence in the record as a whole to support the Board's conclusion that U.S. Marine's failure to have hired the 34 former Chrysler employees violated § 8(a)(3) and (1) of the Act.

The issue concerning whether the Board has the statutory authority under Section 10(c) to order any successor employer to ever restore the terms and conditions of the predecessor employer is of more substance, particularly in view of Judge Easterbrook's dissenting opinion. The Union nonetheless would in the circumstances of this particular case and in view of the current situation involving the closing of the Hartford plant, respectfully submit that U. S. Marine's petition should be denied in toto. The Seventh Circuit's judgment enforcing the Board's order, given the specific facts and circumstances that were found to exist does not create a conflict with the other circuits; and a restoration of the status quo ante is not a penalty but is a type of remedy that is available to the Board under § 10(c) of the Act.

The Union would emphasize that the Board's restoration of the status quo ante remedy in the context of a successorship case is inextricably interrelated with and arises from its finding that U. S. Marine had violated both § 8(a)(5) *and* (3). (App. 72a) The Court of Ap-

peals judgment enforcing the Board's order was likewise premised on the fact that U. S. Marine had violated § 8(a)(5) *and* (3). ["The remedy ordered in this case is based on the established principles applicable to successors who discriminate in order to avoid a bargaining obligation . . ."] (App. 40a)

I. AN EMPLOYER'S REFUSAL TO HIRE THE EMPLOYEES EMPLOYED BY THE PREDECESSOR AS PART OF A SCHEME TO EVADE ACQUIRING A BARGAINING OBLIGATION UNDER *BURNS* IS UNLAWFUL UNDER § 8(a)(3) OF THE ACT AND THE COURT OF APPEALS DECISION HOLDING THAT THERE WAS SUBSTANTIAL EVIDENCE ON THE RECORD TO SUPPORT THE BOARD'S CONCLUSION WAS PROPER.

In *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 262 n.8 (1974) this Court made clear that ". . . [A] new owner could not refuse to hire the employees of his predecessor solely because they were union members *or* to avoid having to recognize the union . . . . " (emphasis added) and citing *NLRB v. Burns Int'l Security Services*, 406 U.S. 272, 280-81, n.6.[12]

All eleven judges of the Seventh Circuit have agreed that both the Board's findings and conclusion relative to U. S. Marine's failure to hire the 34 former Chrysler em-

---

[12] *Howard Johnson* involved a case arising under 301 LMRA where the union representing the employees of the predecessor employer had sought to require the new owner to arbitrate the issue of the new owner's failure to have hired the predecessor's employees. This Court noted ". . . There is no suggestion in this case that Howard Johnson in any way discriminated in its hiring against the former Grissom employees . . ." 417 U.S. at 262 n.8.

The question of whether a new owner has a legal duty to recognize the union that represented the predecessor employees as the successor to the predecessor employer appears to be one that should be resolved, in the event there is a dispute, under the NLRA and not under § 301 LMRA. *Cf. Laborers Trust Fund v. Advanced Concrete*, 484 U.S. 539, 544 n. 6 (1988).

ployees violated § 8(a)(3) and (1) was supported by substantial evidence on the record as a whole. (App. 19a-29a).

This Court has long recognized that "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951). *Also see Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 172-173 (1973).

U. S. Marine doesn't argue that the court of appeals decision does not comport with the *Universal Camera* standard, but instead argues that this Court's decision in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) has made *Universal Camera* irrelevant.

This Court in *Transportation Management* upheld the Board's position regarding a dual motive type case where the Board had found that the employer had violated § 8(a)(3) and (1) by having discharged an *individual* employee because he had engaged in protected union activities. As the Court held, ". . . It is thus clear that the Board's finding that Santillo would not have been fired if the employer had not had an anti-union animus was 'supported by substantial evidence on the record considered as a whole' . . ." 462 U.S. at 405.[13]

Transportation Management did not involve the refusal to hire a number of the predecessor's employees by a new

---

[13] U. S. Marine's reliance on *Halo-Krome Co. v. NLRB*, —— F.2d ——, 138 LRRM 2661 (1991) (Emp. Pet. 28-29) is wholly misplaced. In *Halo-Krome Co.* the Second Circuit did apply the same *Universal Camera* standard as did the Seventh Circuit. The Seventh Circuit after review of all the evidence concluded that the Board's inference that the 34 former Chrysler employees were not hired in ordr to evade a bargaining obligation was reasonable and supported by the substantial evidence (App. 28a).

owner not because of any of their own individual union activities but in order to simply permit the new owner to evade becoming a successor employer under the Act.

It was not necessary in the circumstances presented here for the General Counsel to show that it was the particular union activities of each of the 34 that caused Hoag to not hire each of them because it was U. S. Marine's seeking to evade a bargaining obligation as the successor to Chrysler that caused it to not hire the 34, *see Ballou Birch Co. v. NLRB*, 798 F.2d 339, 342 (8th Cir. 1986). *Also see Birch Run Welding and Fabricating Inc. v. NLRB*, 761 F.2d 1175, 1179-80 (8th Cir. 1985); *M.S.F. Industries Inc. v. NLRB*, 568 F.2d 166, 176 (10th Cir. 1977); *Majestic Molded Products Inc. v. NLRB*, 330 F.2d 603, 606 (2nd Cir. 1964).

U. S. Marine has failed to demonstrate any legitimate reason as to why this Court should grant its petition for certiorari on the issue of whether there was substantial evidence to support the Board's conclusion that U. S. Marine's failure to hire the 34 former Chrysler employees was to evade becoming a successor and the Union would respectfully request that this Court deny any review of that issue.

II. THE BOARD'S RESTORATION OF THE STATUS QUO ANTE REMEDY WAS NOT INCONSISTENT WITH "*BURNS*"; WAS NOT PUNITIVE; AND THE COURT OF APPEALS' DECISION ENFORCING THE BOARD'S REMEDIAL ORDER APPLIED THE PROPER STANDARD FOR REVIEW AND WAS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

It has to be borne in mind that conduct of the kind engaged in by Hoag on behalf of U. S. Marine doesn't simply exist in a vacuum or that U. S. Marine doesn't really intend to accrue benefits to itself by engaging in such conduct. U. S. Marine knew when it had Hoag embark on the scheme it did that "[I]n the labor field,

as in few others, time is crucially important in obtaining relief . . ." *NLRB v. C & C Plywood*, 385 U.S. 421, 430 (1967). U. S. Marine was also aware that by unlawfully withholding recognition this "disrupts the employees' morale, deters their organization activities, and discourages their membership in unions . . ." *Franks Bros. Co. v. NLRB*, 482 U.S. 27, 49-50 (1987), cited approvingly in *Fall River Dying & Finishing Corp. v. NLRB*, 482 U.S. 27, 49-50 (1987).

Fall River Dying is important in that it is a "successorship" case and therein this Court fleshed out what it had earlier held in *NLRB v. Burns Int'l Security Services Inc.*, 406 U.S. 272 (1972).

The Board here has grounded its authority to provide for a status quo ante remedy in a successorship situation from this Court's recognition in *Burns* that there may be exceptional situations where a new owner could be obligated to consult with the union over the initial terms and conditions of employment. *Burns*, 406 U.S. at 294-295 (*also see* App. 70a-71a).

Fall River Dying adhered to the view, earlier expressed in *Burns*, that there could exist "the exceptional situation . . . in which a successor should consult with the union before setting these [initial] terms and conditions, from the standard situation in which a successor could set its own terms free of the union's involvement . . ." 482 U.S. at 47 n.14.[14]

Judge Easterbrook's dissent, however, recognizes no such "exceptional situation" that would ever justify the Board's status quo ante remedy. According to Judge

---

[14] In both *Burns* and *Fall River Dying*, the employer's in those cases did not unlawfully fail to hire the predecessor's employees in order to evade having to bargain with the union that had represented the predecessor's work force. Indeed, in *Fall River Dying* the employer there had continued to hire the predecessor's employees even after the union's premature recognition demand and it thereby acquired a bargaining obligation 482 U.S. at 52-54.

Easterbrook, the status quo ante remedy in a successor case would always constitute a penalty and a new owner must always have the absolute right to establish the initial terms and conditions.[15]

This Court has rejected arguments similar to those raised by U. S. Marine and as advanced in the dissenting opinion. No one doubts that employers have the right to subcontract work. However, where the employees are represented by a union if the employer *unilaterally* exercises that right to subcontract without first having afforded the union an opportunity to discuss such a decision, the employer will be deemed in substance for purposes of a remedy to have forfeited such right, *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 214-217 (1964).

This Court in *Fibreboard* rejected the argument that because the employer could "effect cost savings . . . by contracting the work out . . . [that] there is no need to attempt to achieve similar economies through negotiations . . . or to provide them [employees] with an opportunity to negotiate a mutually acceptable alternative." *Fibreboard Corp.*, 379 U.S. at 214. In rejecting such argument this Court's decision acknowledged, ". . . [A]lthough it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiations." *Ibid.*

Because a new owner has the power in substance to determine by its hiring policies whether or not it will become a "successor" under the *Burns/Howard Johnson/*

---

[15] If the new owner retains the predecessor work force and initially retains the predecessor's terms and conditions but subsequently unilaterally changes those terms and conditions without having consulted with the union, such conduct would violate § 8(a)(5) and the Board's remedy would require the restoration of the status quo ante, *see Advanced Concrete supra*, 484 U.S. at 544 n.6. Therefore an "exceptional situation" under *Burns* must include a situation other than one that would already be covered by the Act.

Fall River Dying holdings, such a new owner when acting lawfully in regards to the hiring of employees retains the right to unilaterally establish the initial terms and conditions of employment; *see Spruce Up Corp.*, 209 NLRB 194 (1974), *enfc'd*, 529 F.2d 516 (4th Cir. 1975).[16]

Where the new owner is found to have implemented an unlawful hiring policy in order to evade fulfilling the legal duties of a successor then, according to the Board, that in essence presents an "exceptional situation, not a standard situation, where the new owner should consult with the union before setting the initial terms and conditions . . ." *Fall River Dying*, 482 U.S. at 47 n.14.

If a new owner is found to have brought itself by its conduct into "the exceptional situation" but hadn't consulted with the union before setting the initial terms and conditions then it is only through § 10(c) of the Act that the Board can restore that "exceptional situation" to what it should've been. Therefore an order such as provided by the Board in this case is one, ". . . which deprives an employer of advantages accruing from a particular method of subverting the Act, [and] is a permissible method of effectuating the statutory policy . . ." *Virginia Electric & P. Co. v. NLRB*, 319 U.S. 533, 540-541.

In *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) this Court held that a particular remedy that had been provided by the Board, i.e., requiring the employer there to agree to grant a check-off authorization, was not enforceable. However, that portion of the Board's order was deemed not enforceable, not because it was deemed to be

---

[16] This Court took note of the Board's *Spruce Up* decision in *Fall River Dying*, 482 U.S. at 46 n.12 but only in regards to the fact that the Board had adopted the position that work force continuity for successorship cases was determined by whether a majority of the new owner's employees were those of the predecessor. Where a majority of the new owner's employees had been employed by the predecessor then the new owner according to the Board, is the successor and obligated to recognize the union.

a "penalty", but because this Court held that the Board's remedial authority under § 10(c) of the Act was limited by the same considerations that led Congress to enact § 8(d). 397 U.S. at 107.

U. S. Marine does not contend nor does the dissenting opinion argue that the considerations that led Congress to enact § 8(d) deprive the Board of the remedial authority in an "exceptional situation" arising in what might be described as a quintessential successor case [17] from ordering a new owner/successor to restore the terms and conditions of the predecessor where the new owner could be deemed to have had the obligation to discuss with the union the initial terms and conditions.

Judge Easterbrook asserted that "an obligation to 'consult' does not imply an obligation to use the old terms unless the union agrees to different ones . . ." (App. 54a). This court in *NLRB v. Katz*, 36 U.S. 736, 745 n.12 (1962), however, held that there is a substantial difference between the employer who engages in "consultation" first with the union and then acts, and the employer who unilaterally acts without consultation with the union. In the case of the former, the employer is free to act *after* consultation, but in the case of the latter, the employer commits an unfair labor practice and will be required as part of the remedy to restore the status quo ante, *see Fibreboard, supra.* In other words, a new owner's obliga-

[17] It is interesting to compare what occurred when the owners of U. S. Marine acquired the "assets" from Chrysler and how that impacted on the employees working at the Hartford plant with what occurred when the four owners of U. S. Marine's shares sold all the shares to Brunswick and how that impacted on the employees then working at the Hartford plant. In the latter case work went on just as before but in the former there was a one week shutdown and then work proceeded just as before except the employees were not permitted to be represented by the Union; 34 former Chrysler employees no longer were working and didn't know why the new owners had unilaterally established certain new terms and conditions for the employees working at the Hartford plant.

tion to discuss the initial terms before unilaterally establishing new terms and conditions does not mean that after having had discussed same with the union that it isn't thereafter free to unilaterally put into effect such changes even though the union might not agree.

The dissenting opinion also appears to reject the "uncertainty" principle (App. 59a). However, in law as in physics,[18] there is an "uncertainty" principle and that is used by courts as a matter of public policy and provides that "[T]he most elementary conception of justice and public policy requires that the wrongdoer shall bear the risk of uncertainty which his own wrongdoing has created . . ." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-265 (1946). *Also see Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); *Thorp Sales Corp. v. Gyuro Grading Co.*, 111 Wis.2d 432, 441 (1983).

To permit U. S. Marine to retain such advantages accruing to it from the particular methods it used to subvert the Act would be to in essence permit the wrongdoer to profit by its own fraud and wrongdoing and to encourage that which the Act forbids. It had been recognized that "[N]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrongdoing, or to found any claim upon his own inequity, . . ." *Riggs v. Palmer*, 115 N.Y. 506, 511-512, 22 N.E. 188, 190 (1889) cited approvingly in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, —— U.S. —— 60 U.S.L.W. 4029, 4033 (1991).

When wrongdoer employers are permitted to retain the profits from their own unlawful conduct to evade compliance with the NLRA, the ones then who are "penalized" are not only the employees of the employer, but also the employers who chose to observe the rule of law even though they may incur costs for them to do so.

---

[18] *See* Paradigms Lost, John L. Casti pp. 450-453 for discussion of Werner Heisenberg's uncertainty principle as used in physics.

In *Food Handlers v. Valmac*, 528 F.2d 217-218 (8th Cir. 1975), the Eighth Circuit observed how the employer there ". . . fashioned this unbelievably strange situation out of what Shakespeare would call 'a quick sand of deceit' . . ." and that, ". . . Any reduction [in the remedy provided to the union by the arbitrator] would be inconsistent with the policy of the National Labor Relations Act because it would encourage the very conduct the Act sought to discourage—'bad faith' bargaining . . ." It also observed "Oh, what a tangled web we weave when first we practice to deceive [citing Scott, Marmion, Conto VI, st. 17] . . ."

The Union submits, and with all due respect to Judge Easterbrook, that if American industry and their representatives in order to survive have to deliberately engage in the unlawful conduct of the kind that Hoag engaged in on behalf of U.S. Marine in order to survive and compete against other employers that, then this country is truly in very serious trouble.

Lastly the Union would note that this case is already eight years old and the plant will be closed as of January 31, 1992. As far as any future bargaining obligation that might have been required under the Board's order, that question is now for all practical matters moot with the cessation of business at the Hartford, Wisconsin plant effective January 31, 1992 and with the few remaining employees all having been laid off.

In such circumstances and because the Seventh Circuit's decision is not at odds with the holdings of this Court or really create a conflict with the other Circuits, the Union believes that these practical reasons should be weighed in the calculus of this Court as to whether U.S. Marine's petition should be granted.

CONCLUSION

For all the foregoing reasons, the Respondent Unions respectfully submit that the Petition for a Writ of Certiorari should be denied in its entirety.

Dated this — day of January, 1992.

Respectfully submitted,

KENNETH R. LOEBEL
Counsel of Record
PREVIANT, GOLDBERG, UELMEN,
GRATZ, MILLER & BRUEGGEMAN, S.C.
1155 N. RiverCenter Dr.
Suite 202
P. O. Box 12993
Milwaukee, WI 53212
(414) 271-4500
Attorneys for Respondents International Union, Allied Industrial Workers of America, AFL-CIO and its affiliated local, Local 879, Allied Industrial Workers of America